Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petitions of Ameritech Corporation, USWest Communications, Inc., and Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26 CC Docket No. 98-32 CC Docket No. 98-11

COMMENTS OF THE

COMPETITION POLICY INSTITUTE

Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
1156 15th St. NW Suite 310
Washington, D.C. 20005

3773 Cherry Creek North Drive
Suite 1050
Denver, CO 80209

April 6, 1998

Summary

While CPI does not believe the Commission should grant the specific relief sought in these petitions at this time, the Commission should use the information provided in the petitions and the comments to propose specific rule and policy changes in the notice of inquiry that it must issue under Section 706 later this year. After gathering more information, the Commission may well conclude that some elements of the relief sought by the Petitioners are appropriate. For, as Congress recognized, it is critical that the Commission continuously review its policies to determine whether any policy stands in the way of the public interest goal of rapid deployment of advanced services.

Two elements of the relief sought by the Petitioners could collide with the scheme enacted by Congress. First exempting high speed data services from the interLATA restriction outside the section 271 process undoubtedly reduces the market-opening incentive provided to the RBOCs. The issue will turn on whether it is possible to distinguish broadband data traffic from circuit switched traffic *and maintain that distinction.*

Second, the requested removal of xDSL services from the unbundling and resale requirements of section 251 must be closely examined to determine the effect on competition in these services and the services, like basic voice service, that use common facilities. Here again, the merger of voice and data and the future relationship between data networks and circuit-switched networks becomes central. The Commission must decide whether it is possible realistically to compete with an incumbent LEC if xDSL services are not available as unbundled elements.

These are worthy questions. CPI looks forward to additional opportunities to comment on these matters as the Commission undertakes its inquiry under section 706 of the Telecommunications Act.

COMMENTS OF THE

COMPETITION POLICY INSTITUTE

I. INTRODUCTION

The Competition Policy Institute (CPI)[1] appreciates the opportunity to submit these comments on the petitions filed by Ameritech, USWest and Bell Atlantic (collectively, the "Petitioners") concerning broadband data services. These petitions ask the FCC to make a variety of policy and rule changes that these companies believe will improve their incentives to provide high-speed data services for consumers, businesses, and specialized users.

These petitions raise a number of important and fundamental questions concerning the interaction between regulation and the deployment of advanced technologies and services. The companies maintain that relieving them of the unbundling and resale obligations of section 251 and the interLATA restriction of section 271 for broadband data services will allow them to deploy these services more quickly.

This argument challenges several of the assumptions underlying the Telecommunications Act of 1996 and the FCC's rules to implement that Act. In addition, the relief that these companies seek may depend, in part, on the

---

[1] CPI is an independent, non-profit organization that advocates policies to promote competition for telecommunications and energy services in ways that benefit consumers. More information about CPI is available on our web site at <www.cpi.org>.

technology used to provide these broadband data services. To a large extent, the premise of these petitions is that new data technologies, such as Asynchronous Digital Subscriber Line (ADSL), do not fall within the traditional regulatory regime created by Congress and the FCC for voice telephony. While ADSL has existed for several years in the laboratories and in a single field trial in northern Virginia, it has only recently evolved into a full-fledged competitor to certain other data technologies such as ISDN and data transmission using cable modems.

For all these reasons, it would be premature for the Commission to grant any specific regulatory relief sought by these petitions until the Commission undertakes a more comprehensive examination of the technical, legal and policy issues raised by these petitions. The Commission must develop a good understanding of these DSL technologies and their future evolution before adopting any particular rule or policy changes. Some of the requests for regulatory relief submitted by these carriers may be deserving, some may be unnecessary, while some others may harm the prospects for local telephone competition.

CPI recommends that the Commission should use these petitions, and the comments submitted in response, as the basis for proposing specific regulatory changes in its upcoming proceeding to implement section 706. In other words, the FCC should treat these petitions, and this round of comments, as the first stage of the proceeding required under section 706. The Commission will then be in a stronger position to propose specific rule and policy changes in the a notice of inquiry that it must issue by August 8th of this year. This will make it more likely

that the Commission will be able to adopt specific rule and policy changes in its order "completing" that proceeding next February.

With this background, CPI does not offer comments in support of or in opposition to these petitions. Instead, our comments offer thoughts on the questions raised by these petitions and provide additional information to help clarify some of the issues surrounding the deployment of DSL technologies and Internet backbone services.

These petitions offer the Commission an opportunity to think anew of the purposes that regulation can serve and analyze the costs and benefits of each regulatory provision. Obviously, the Commission's ability to reform its regulatory process is constrained by statute. Nevertheless, it is worthwhile for the Commission to continue to evaluate whether each of its regulations serves the public interest. If the Commission finds that certain statutory provisions unnecessarily constrain its ability to serve the public, the Commission should so inform Congress and request statutory changes.[2]

II. BACKGROUND ON ADSL

As noted, the Petitions rest heavily on the expansion of so-called DSL technologies. Because the Petitions do not provide much detail about these technologies, this section will provide a brief discussion of them.

---

[2] The FCC has often proposed amendments to the Communications Act, and many of its suggestions in the past have been incorporated into FCC authorization bills and several others were incorporated in the Telecommunications Act of 1996.

The availability of broadband data services and the Internet could fundamentally alter the way that Americans receive and distribute information. Unfortunately, fiber and coaxial based technologies, once thought to be the technologies of the future for local distribution, have not yet overcome technical and cost hurdles.[3] Telephone company engineers are now refocusing on getting the maximum bandwidth out of the twisted copper pair that already connects 95% of the nation's homes and businesses. The so-called "xDSL" generation of technologies are capable of providing a variety of high-speed communications simultaneously over multiple, and separable, transmission paths. One writer has

---

[3] Over the past two years, telephone companies have virtually abandoned plans to provide broadband services to the home by way of hybrid fiber-coaxial cable (HFC) or "fiber to the home" technologies. According to one observer

> Two ugly clouds rained on the spirited adventure [toward HFC] -- costs and revenues. HFC proved to be rather more expensive than originally projected, and implementing Video on Demand [VOD] still taxes the best system technologists. Even with original projections, no trial or study demonstrated that customers would pay more for VOD than movie rentals, and the market for movie rentals, in its entirety, was not enough to justify the billions needed for new infrastructure. "ADSL is Happening" by Kim Maxwell, ADSL Forum, available at < www.adsl.com>.

> Two years ago a number of telephone companies predicted a gradual erosion of their copper plant in the wake of Hybrid Fiber/Coax (HFC) or Fiber to the Home (FTTH) deployment. Most of these plans have been shelved. A limited number of telephone companies continue[s] to deploy HFC, but only two of them intend to use it for telephony in the near future. A few telephone companies have active programs to install Fiber to the Curb (FTTC) for new build and refurbishment programs, but these have not gone beyond trial stage yet. In general, there are no immediate threats to the installed base of copper telephone lines, and no major programs to subvert new copper installations in most of the world. "Growth of Copper Lines" by Kim Maxwell, ADSL Forum, available at <www.adsl.com>.

describe the possibility of ADSL[4] this way:

> With ADSL, telephone companies can connect almost every home and business to exciting new interactive broadband services now. For all its capacity, ADSL leaves Plain Old Telephone Service undisturbed. A single ADSL line therefore offers simultaneous channels for personal computers, televisions, and telephones. For example, a family in an ADSL home might be engaged as follows:
>
> > Joe, home from college, watches a movie on one TV
> > Allison, still in high school, does interactive homework on another TV
> > Mom accesses her corporate Local Area Network (LAN) at high speeds on her PC
> > And video conferences with her project group on the same PC
> > Dad surfs the Internet on his PC at warp speeds
> > A fax arrives from a colleague.[5]

Another writer describes xDSL technologies this way:

> DSL is not so much a service as an enabler of high-speed services. It can be more economically provisioned than traditional channelized T-1 and 56 or 64 kb/s circuits. . . . The DSL market is expected to explode because the technology does not require carriers to change the services they currently use. Instead, it allows them to provide existing services at faster speeds and lower costs than before.[6]

DSL transmissions are routed from the consumer's premises over the traditional twisted copper pair to a telephone company central office. The data and voice traffic is then separated; voice traffic is routed through the circuit switch,

---

[4] ADSL stands for Asynchronous Digital Subscriber Line. It is a technology that allows the "downstream" transmission rates to be significantly faster than the "upstream" data rates (and thus "asynchronous"). ADSL was originally designed to help distribute video on demand to consumers' homes, a use that requires more "downstream" than "upstream" capacity.

[5] "The World is Already Wired for Multimedia Communications", ADSL Status, ADSL Forum, available at <www.adsl.com>.

[6] "Not reinventing the wheel" by Frank Wiener, InFocus, March 16, 1998 (available at <www.internettelephony.com>).

while data traffic is diverted and sent over an "access network" to the Internet or some other data network. The industry is still evaluating two different protocols for "access networking"-- ATM or IP. Regardless of which approach they take, telephone companies are able to deploy ADSL more quickly than ISDN. ISDN is a slower and more expensive circuit-switched based technology. ADSL, on the other hand, is significantly less expensive because it does not require upgrades to the circuit switch.

> It is clear now that telephone companies can deploy ADSL access networks within the next twelve to eighteen months which will have attractive cost profiles, ones compatible with (a) competing with current cable modem pricing and (b) making money. While it would be naive to minimize the networking problems ahead, two factors promote the idea that ADSL networks will not be like ISDN, waiting, and waiting, and waiting. First, ADSL will run on over-lay networks, which will be physically separate from all other existing networks except the copper pairs. This means that telephone companies do not have to either integrate or upgrade existing switches or deploy combined signaling systems. As a consequence, once they have ironed out network kinks, telephone companies can fit central offices with ADSL networks with lightening speed. Second, a starter network can be fashioned from products available today -- no new protocols, no breakthrough hardware pieces, no new standards.[7]

It appears that the telephone companies, as well as local competitors and internet service providers, are actively pursuing the opportunities that ADSL promises. As the attached chart shows, virtually every major telephone company has ADSL trials either underway or planned in the next 12 months.

---

[7] Id. See also, "The Promise of ADSL" by Steven Shepard, InFocus, March 16, 1998 ("Basic rate ISDN doesn't offer the bandwidth that ADSL provides, and is a fairly expensive installation because of the need to install updated switch generics. ADSL has no such software requirement. Furthermore, ADSL offloads data from the local switch, while ISDN does not In this regard, ADSL offers a clear advantage.")(available at <www.internettelephony.com>)

ADSL is just one of a family of DSL technologies under development. The technology with perhaps the most promise is called Very high rate Digital Subscriber Line, or VDSL. While ADSL is capable of transmitting information at speeds ranging between 1.5 to 9 Mbps, VDSL promises to deliver data rates from 13 to 55 Mbps. VDSL could be capable of providing the "full service network" that has been a gleam in the eye of network planners for years. VDSL could also be even less expensive to deploy than ADSL, once the standards and equipment become available.[8]

III. ANALYSIS

A. DSL SERVICES

Each of the three petitions argues that the regulatory relief that they seek will give them greater incentives to deploy these new advanced technologies. Of course, this is the argument that every regulated company in every industry makes against regulation. This precise argument was considered and rejected by Congress in enacting the Telecommunications Act and by the FCC in adopting its rules to implement that Act. Is there any reason why the telephone companies' arguments should be more persuasive for these broadband data technologies?

---

[8] Other members of the DSL "family" include High bit-rate digital subscriber line, or HDSL (which provides 1.544 Mb/s service over two pair), HDSL-2 (which will provide full T-1 capability over a single pair), rate adaptive DSL or RADSL (which is able to dynamically select the most appropriate data rate given changing line conditions and may replace ADSL at some point in the future), and consumer DSL, or CDSL (which provides only 1 Mb/s of downstream bandwidth but which can be installed simply by changing the existing line card and does not require additional hardware or complex wiring). See, "The Promise of ADSL", by Steven Shepard, InFocus, March 16, 1998 (available at <www.internettelephony.com>).

Perhaps. There is, of course, some truth to the argument that regulation imposes costs on the regulated company that may reduce its incentive or ability to deploy new technologies. While there are some problems with Ameritech's study showing the effect of regulation on new technology, the general point that regulation affects business judgments of companies is generally understood.[9] Presumably, companies decide to roll out new technologies only if the potential revenues from the service exceed the costs by a large enough amount that the companies expect to earn a reasonable return. To the extent that regulation limits potential revenues or profit, or imposes additional costs, regulation may tip the scales against a new technology.

For this reason, regulators have restricted their efforts to companies that

---

[9] Ameritech's study purports to "examine the pernicious effects that regulation can have on the innovation and the introduction of new telecommunications services." Unfortunately, the study focuses only on new services introduced by Ameritech and does not consider the new services introduced in the marketplace as a whole, by Ameritech and other companies, as a result of the regulatory process. For instance, many of the Open Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) rules were designed to stimulate the deployment of new technologies by enhanced services companies using piece parts of Ameritech's telephone network. While (CEI) obligations may have reduced Ameritech's ability to introduce new technologies, it may have stimulated other companies to deploy even more new services because they could make better use of Ameritech's network. Further, it is interesting to note the study's conclusion that Ameritech introduced more new technologies when its ONA plans were in effect (and thus CEI plans were not required). The ONA process, which was required by FCC regulation to stimulate enhanced services, is closely analogous to the unbundling and interconnection requirements imposed by the Telecommunications Act to stimulate local telephone competition. On this point, the study appears to support the notion that compliance with unbundling requirements will stimulate, not delay, new services by Ameritech. See, "The Effects of Regulation on the Innovation and Introduction of New Telecommunications Services," a study funded by and conducted for Ameritech by James Prieger, March 2, 1998, Attachment B to Ameritech's Petition.

have market power over certain services. In these cases, the concern about the costs imposed by regulation is balanced with the need to protect "captive" customers from excessive rates or discriminatory practices. If the ILECs' DSL services are exempted from the unbundling and resale requirements of the Act while they have market power over these services, the ILEC could thereby acquire an insurmountable advantage in this new emerging market. The ILECs could charge excessive prices or make ADSL services available in only certain markets. Without any requirement to provide unbundling or resale, the ILEC could effectively prohibit competitive entry into the DSL market by refusing to make the DSL components of its network available to competitors. Customers would not obtain the benefits of a competitive marketplace, and the goals of the Telecommunications Act would not be achieved. On the other hand, if a company faces enough competition that the market itself constrains the behavior of the firm, detailed rate and profit regulation becomes unnecessary. When customers are not "captive", regulators can relax or remove regulation.

We now examine the specific arguments made by the Petitioners in favor of removing their broadband data services from the unbundling and resale requirements of the Act.

1. The Competitive Argument

It is not clear whether or not there is sufficient competition for these data services to restrain the pricing and other behavior of these firms. The Petitions themselves are contradictory on this point. USWest, for instance, maintains that

its rural consumers do not have access to broadband data services and that USWest is the company most likely to provide it to them. (USWest Petition, pp 3-4.) But USWest elsewhere argues that, once it makes unbundled loops available, xDSL service is and will be competitive.[10]

Since ADSL deployment is still mainly in the trial stage for ILECs, CLECs, and ISPs, it is difficult to agree that there is sufficient actual competition for DSL services to justify complete deregulation of these services. The Petitions present almost no information about the market penetration of DSL services by any carrier. CPI recommends that, prior to taking any specific action in response to these requests, the Commission should gather as much evidence as possible about the actual penetration and deployment of ADSL and other DSL technologies.

To be fair, the Petitioners appear to maintain not that the DSL services are today competitive, but that the market for DSL equipment is competitive today and the market to provide DSL services over ILEC unbundled loops could easily become competitive in the near future. In other words, the Petitioners appear to argue that the entry barriers for competitive suppliers of DSL services are extremely low. A competitor need only lease unbundled loops that are "conditioned" for DSL from the ILEC, collocate its own DSL equipment at an ILEC central office, and provide competitive service.

---

[10] "The specialized equipment used to provide xDSL, such as DSLAMs and ATM switches, are facilities that any competitor can supply, and many do. . . . the market for this equipment is fiercely competitive, and none of it needs to be located on incumbent LEC property." (USWest Petition, p. 49)

This argument rests upon two unproven assumptions -- that competitors can obtain unbundled loops and that they can collocate equipment in the ILEC central office. The actual availability of these essential components should not be presumed. Both unbundled loops and collocation are items on the 14-point checklist that the RBOCs must meet in order to obtain approval to enter the long distance market. After considering four applications to date, the FCC has not found any RBOC to be in compliance with the checklist. The overarching issue affecting the availability of both these items is the availability of nondiscriminatory operations support systems (OSS). The Commission will soon issue an order in response to LCI's Petition for Rulemaking on OSS issues to speed its implementation. Before making the assumption that DSL services are potentially competitive, the Commission must gather much greater information than is supplied by these petitions concerning the real-world availability of unbundled loops, the actual implementation of collocation, and the progress toward implementation of nondiscriminatory OSS on a widespread basis.

Finally, the Petitioners' allude to the growth of alternative providers of "broadband" data services, such as cable operators, wireless providers, and satellite companies. Significantly, the Petitioners do not appear to allege that such competition is significant enough to constrain the market power of the ILEC. In fact, the Petitioners appear to take the approach that these competitors are unlikely to satisfy the demand for consumer access to broadband services, and that the

telephone companies may be the only provider capable of providing such services.[11] Thus, the carriers do not attempt to make the case for deregulation under the *Competitive Carrier* line of FCC decisions.

2. The New Services Argument

Petitioners also make the argument that forbearing from the unbundling and resale obligations for DSL technologies, whether nor not they are competitive, will encourage them to deploy these services more quickly to consumers. This argument raises an even broader issue -- Why regulate broadband data services at all?

In general, the Commission has not, to this point, regulated data services any differently than voice services. While the FCC has largely eliminated regulation for most interstate services provided by long distance companies, including data services, the FCC continues to regulate interstate services provided by local exchange carriers (LECs), including their data services. In other words, the current FCC regulatory process does not distinguish between voice and data traffic.[12]

---

[11] The possibility that facilities-based competitors could, at some point, enter a market gives the ILECs the incentive to lock in their major customers to long-term contracts now before any competitor's facilities reach those customers. Thus, the prospect of competition from these carriers down the road does not guarantee that consumers will benefit from the actions of the ILEC today. Thus, it would be premature for the Commissiion to relieve the Petitioners of their obligations to make their DSL services available through unbundled elements and resale

[12] See, Kevin Werbach, A Digital Tornado: The Internet and Telecommunications Policy, Office of Plans and Policy Working Paper (March 1997):

> However, in Computer II and in subsequent orders, the Commission has addressed the implications of packet-switching technologies for this framework. In Computer II, the Commission described basic communications services as providing "pure transmission capability over a communications path that is virtually transparent in terms of its

This regulatory practice has its basis in both economic and practical reality. Voice and data traffic travels over the same local telephone company network. Thus, if the LEC is the only provider of facilities in a market, it has the same ability to use its monopoly power for data services as for voice services. Furthermore, it would be quite difficult, if not impossible, for the Commission to adopt policies that distinguish data from voice traffic. Data traffic and voice traffic use the same transmission paths (local loops, access trunks, satellites, etc.), and each can be transmitted in either analog or digital transmission streams. If the Commission attempted to differentiate between data and voice traffic, the Commission would have to look behind the transmission form and examine the "content" of the message being delivered, raising significant privacy and first amendment concerns, not to mention daunting practical concerns.

In short, there are two reasons for regulating data services: 1) if the incumbent has market power over local telephone facilities, it can distort the market for data services just as easily as it can for voice services; and 2) if the

---

interaction with customer-supplied information." The use of packet switching and error control techniques "that facilitate the economical, reliable movement of [such] information [do] not alter the nature of the basic service." Thus, for example, in subsequent decisions the Commission has determined that packet-switched networks following X.25 protocols, and frame relay service offerings, provide a basic transport service. (Application of AT&T for Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States, 94 FCC2d 48, 55-57 (1983); Independent Data Communications Manufacturer's Association, Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service, Memorandum Opinion and Order, DA 95-2190 (released October 18, 1995).)

incumbent has market power over voice services but not data services, it may be impossible to segregate the data traffic from the voice traffic.

The Petitioners appear to argue, however, that the FCC can adopt different policies for "broadband" data services because the DSL technologies permit the voice and data traffic to be separated at the central office. The voice traffic is routed through the circuit switch, whereas the data traffic travels over a network that is completely separate from the circuit-switched network. At least one commentator asserts that the FCC should adopt a "containment" strategy to "wall off" broadband data services from regulation.[13]

The Petitioners argue that such a bifurcated approach will give them greater incentives to deploy the DSL technologies. But, if this relief is granted, it would also give the Petitioners greater incentives to migrate their voice traffic onto DSL services in order to avoid regulation. If they attempt to migrate voice services onto DSL by lowering the prices of DSL, consumers may benefit initially. But if the ILEC instead encourages migration by manipulating prices and services (such as withdrawing some service features from basic local exchange service and bundling them only with higher-priced DSL services), consumers may be harmed. Furthermore, the Petitioners' "containment" argument has some appeal in large part because of the particular architecture of DSL technology that splits voice and

---

[13] See, "Addicted to Data: The Need for More Bandwidth on the Information Superhighway", by Thomas J. Duesterberg, published by the Hudson Institute (available at <www.hudson.org>).

data traffic. The relief that the petitions request, however, is not restricted to DSL technologies, but applies to all broadband data services. Future evolutions of broadband data technologies may not continue the bifurcated treatment that is currently planned. If all broadband data services are exempt from unbundling and resale, the telephone companies could migrate voice and data to these data technologies in order to avoid competition and bypass significant consumer protections. Thus, exempting DSL services from the unbundling and resale rules could effectively eliminate competitors' access to the voice traffic as well as the data traffic transmitted via a DSL service. The Commission must be wary of adopting any particular regulatory scheme based on a technology that may change in the future.

In addition to the practical problems of separating voice from data, the Petitions raise a fundamental philosophical issue -- can new technologies best be promoted through competition or through regulation? In enacting the Telecommunications Act of 1996, Congress chose to promote new technologies via competition. Monopolies, no matter how well regulated, simply do not have the same incentives to innovate as companies in competitive markets. While the telephone companies allege that the unbundling and resale rules unfairly restrict their profit opportunities, such regulation is necessary to give competitors the opportunity to enter the local telephone market.

It is also not clear that changes to the regulatory process are necessary in order to stimulate the deployment of these new technologies. USWest admits that

it has plans to roll out ADSL to 43 cities over the next year in its region. As mentioned above (and in the attached chart), almost every major telephone company, competitor, and ISP is planning ADSL trials or deployments this year.

There appear to be several reasons for these developments:

a) Competition: Each of the pleadings makes reference to the variety of entities that are deploying broadband data services. Most reports emphasize the battle brewing between cable modems and ADSL technologies. LMDS, satellites, and other wireless providers may soon provide access to broadband data. While the amount of actual competition in the field appears small at the moment, the telephone companies perceive that the threat is growing and have incentives to respond today.

b) Congestion: Each of the Petitioners complains that data traffic is causing congestion to their network switches. ADSL can relieve much of this congestion by splitting off the data traffic and routing it around the circuit switch used for voice traffic. The ILECs thus have incentives today to deploy and promote subscribership of ADSL in order to avoid the costs of adding circuit switching capacity.

c. One-stop shopping: The ILECs have an additional reason to deploy ADSL — it helps them market their own internet access and information services. The ILECs do not have same restrictions on joint marketing for internet acess services and enhanced services that they do for interLATA and some other services. Selling basic telephone service, high-speed internet access

and information services in one package to consumers is certain to be popular.

The Petitioners maintain, nonetheless, that, while they are beginning to deploy these technologies, they will deploy them faster, and on a geographically widespread basis, if they are given the regulatory relief that they seek. Of course, the Petitioners make no commitments to deploy any particular technology to any region by a particular date. The Petitioners instead cite the enormous consumer demand for these services that will drive their deployment. If the demand for these services is truly so strong, then the possible profit potential of serving this market should be a strong enough incentive for the Petitioners to serve these customers without any special regulatory relief. For this reason, the Commission should await further results from the market trials currently underway and should monitor the growth of DSL deployment in various geographic sectors before altering regulations that might endanger the growth of competition.[14]

In sum, Congress decided, after many years of hearings and legislative debate, that competition would provide a stronger incentive to encourage technological innovation than deregulating monopolies. There does not appear to

---

[14] These arguments are reminiscent of the arguments made by rural carriers, and consumers, a few years ago about the shortage of internet access providers in rural areas. These concerns reached Congress, where some Members proposed specially tailored regulations to require provision of internet access services in rural areas. Within two years, the market has resolved many of those issues as internet providers began to serve the rural market. It is not unreasonable to expect the ILECs, CLECs and ISPs to begin to roll out DSL services in urban areas first and turn to more rural areas afterwards.

be any urgent need to alter the regulation of the ILECs' provision of these services. The Commission should carefully consider whether to abandon this Congressional policy in order to satisfy the short-term objectives of the Petitioners.[15]

B. DATA SERVICES AND THE INTERLATA RESTRICTION

In addition to requesting relief from the unbundling and resale restrictions for broadband data services, the petitioners also request relief from the interLATA restriction for these services. The Petitioners make a variety of claims to support the need for such relief:

a) The internet backbone is too "slow"; letting the RBOCs build internet backbone services across LATA boundaries will help to speed up traffic;

b) Universities need faster regional backbone networks to help them engage in high-speed transfer of research and to coordinate their educational programs;

c) The LATA boundaries are non-sensical in a packet-switched world where information travels over a variety of geographic paths to get to its destination;

---

[15] The Petitioners also allege that pricing unbundled elements at forward-looking costs does not provide them with enough incentives to deploy these services. As the Petitioners fully realize, the FCC is not authorized at this time to examine prices for unbundled elements pursuant to the decisions of the Eighth Circuit Court of Appeals. Arguments over pricing issues are addressed at the state level. Even if the Petitioners' concerns about forward-looking prices are valid, the solution is for states to allow them to charge higher prices for these elements, not to exempt these elements of their networks from the unbundling requirements altogether.

d) RBOCs can "aggregate" traffic across LATA boundaries in a more efficient manner that will allow them to provide high-speed access to the internet backbone to rural areas at less expense than any other carriers.

Before addressing each of these claims, one fundamental point is paramount: the more relief of the interLATA restriction is given to the RBOCs, the less incentive they will have to open their networks to competitors in compliance with sections 251/252 and section 271. Thus, even if the RBOCs' above claims are completely accurate, the Commission should weigh the effect of granting the requested relief on the speed with which the local market is opened to competition. Given that local competition has yet to develop as many observers expected, that consumers have not received the promised benefits of local competition yet, and that Congress is looking for the FCC to take further steps to promote the possibilities for local competition, the FCC should be particularly wary of granting any relief that may cause local telephone competition to be delayed even further.

The arguments raised by the RBOCs in support of their interLATA relief are closely parallel to their arguments for eliminating the interLATA restriction for voice traffic. In their efforts to gain interLATA entry, the RBOCs have often argued 1) that the long distance market is not competitive and could become more competitive if the RBOCs are allowed to participate; 2) the RBOCs could satisfy specialized interLATA needs of universities and others; 3) the LATA boundaries are arbitrary; and 4) the RBOCs could provide service more efficiently and at less cost

than other carriers. Nevertheless, Congress determined that the risks of discrimination and market abuse by the RBOCs outweighed these arguments and directed the RBOCs to meet a list of statutory requirements before being allowed into the long distance marketplace.[16]

Furthermore, the reason why the Courts and then Congress codified the interLATA restriction applies to data traffic as well as to voice. The interLATA restriction arose in the Modification of Final Judgment (MFJ) primarily out of concern that the RBOCs would use their control over local exchange service and facilities to discriminate against competing long distance companies if the RBOCs were allowed into the long distance market. The concern was that the RBOCs would give their own long distance services higher quality access to the local telephone network, or engage in cross-subsidization to reduce the costs that their long distance service would have to recover. The same logic appears to apply to internet and data traffic; if the RBOCs are allowed to transport data traffic across LATA boundaries, they could give their own internet backbone facilities superior access to their local exchange network and could subsidize their backbone and interLATA data transmission services to with monopoly local exchange service revenues.

---

[16] Congress allowed some exceptions to the interLATA prohibition for certain services. Section 271(g) identifies several services that the RBOCs are allowed to transmit across LATA boundaries, including internet access to elementary and secondary schools. If the Petitioners' had drafted their requests for relief more narrowly to focus on the particular universities, their case would be stronger. Instead, however, the relief requested by the Petitioners is much broader, encompassing all broadband services for all consumers.

On the other hand, while this logic of applying the MFJ to long distance voice and data services may be parallel, the actual facts may differ. In the court proceeding leading up to the MFJ, the government submitted actual evidence that such discrimination and cross-subsdization had taken place. The Commission should not assume that the evidence of discrimination that took place 20 or so years ago for voice communications would or could be duplicated today. The Commission should gather factual information from all the parties to determine first, whether any such discrimination has occurred, and second, whether there are factors involved in routing data traffic separate from the circuit-switched network that make it impossible or unlikely that the RBOC could engage in such discrimination.

C. LEGAL ISSUES

Bell Atlantic, USWest, and, to a lesser extent, Ameritech, base their petitions upon an argument that the FCC has the legal authority under section 706 to forbear from regulating advanced data services. It does not appear, however, that section 706 grants the FCC this authority. Section 706 contains a direction to the FCC to take some action if it finds that new technologies are not being deployed, but does not independently grant the FCC new authority to take any particular action. Section 706 simply lists the kinds of actions the FCC should consider taking (forbearance, price cap regulation, or promoting competition) but does not give the FCC independent authority to undertake any of these actions. The statute, for instance, neither defines forbearance nor sets forth a standard for determiningg when forbearance is appropriate. This general language is in sharp contrast to the

explicit forbearance authority granted to the FCC under Section 10. That section directs the FCC to forbear if it makes several specific findings. The FCC already has authority to engage in price cap regulation and to promote competition, the other actions cited in the section.[17]

In fact, if the forbearance language is read as an independent grant of authority, then the provisions citing price cap regulation and promoting competition would also have to be considered independent grants of authority as well. But Congress would only have sought to grant authority to implement price cap regulation or to promote competition if it believed the FCC did not already have this authority. If this interpretation is correct, it would appear to call into question the legal basis for the FCC's current price cap scheme of regulation -- a legal conclusion that the telephone companies are unlikely to support.

IV. CONCLUSION

CPI appreciates the opportunity, presented by the petitions of Ameritech, USWest and Bell Atlantic, to comment on the very basic questions of regulation, competition, incentives and innovation. This is the appropriate time to continue and even accelerate this investigation: Section 706 of the Communications Act requires the Commission periodically to conduct an inquiry to determine "whether advanced telecommunications capability is being deployed to all Americans in a

---

[17] In addition, Congress chose to enact section 706 outside of the Communications Act of 1934. It is not clear whether this decision makes it more or less likely that this provision affirmatively grants the FCC independent forbearance authority.

reasonable and timely fashion."

While CPI does not believe the Commission should grant the specific relief sought in these petitions at this time, the Commission should use the information provided in the petitions and the comments to propose specific rule and policy changes in the notice of inquiry that it must issue under Section 706 later this year. After gathering more information, the Commission may well conclude that some elements of the relief sought by the Petitioners are appropriate. For, as Congress recognized, it is critical that the Commission continuously review its policies to determine whether any policy stands in the way of the public interest goal of rapid deployment of advanced services.

The Petitioners should be commended for bringing this issue to the Commission. CPI agrees with the ultimate main point of the petitioners: regulation affects the incentives of a telecommunications provider to make network investments for advanced data services. And because regulation affects the incentives, it also affects the speed with which these services reach consumers. We also agree that regulation should be reduced and prices deregulated where consumers have a choice among competing providers.

The tremendous promise of high speed data services to consumers at all levels means that policy makers should regulate these services sparingly and be vigilant for opportunities to reduce regulation. While the consumer data services market has apparently not yet reached the point where consumers have ready choices, that day may soon arrive if cable modems, satellite services and UNE-